



Department of Law Monthly Report

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Collections & Support

Unit Collects \$2.8 Million In 2003 PFD Payments

In This Issue

COLLECTIONS & SUPPORT	1
COMMERCIAL & FAIR BUSINESS	2
ENVIRONMENTAL	4
LABOR & STATE AFFAIRS	5
LEGISLATION & REGULATIONS	6
NATURAL RESOURCES	6
OPINIONS, APPEALS & ETHICS.....	8
TORTS & WORKERS' COMPENSATION	8
TRANSPORTATION	9
CRIMINAL DIVISION	10
OSPA.....	14
PETITIONS & BRIEFS OF INTEREST	15

The Collections Unit completed posting the 2003 PFD payments totaling \$2,802,454.13. The Unit also closed two civil collection cases and one APOC case this month. In addition, the unit opened one new OSHA case. On the criminal side, the Unit sent 34 letters responding to inquiries from defendants and courts regarding payment agreements and other collection issues and 89 refunds were requested.

The Collections Unit opened 79 criminal and 33 juvenile restitution cases for collection. We returned 14 judgments to the issuing courts due to insufficient information. Initial notices were sent to 338 recipients. Eighty-three judgments were paid in full and Satisfactions of Judgment were filed. Our office received payments totaling \$45,439.63 toward criminal restitution judgments and payments totaling \$114,551.19 toward juvenile restitution judgments in January. We requested 419 disbursement checks, and issued 255 checks to recipients.

Action Against CSED in North Carolina Dismissed

AAG Stacy Steinberg responded to an action filed by a child support obligor, Mr. Honea, against CSED in North Carolina. Mr. Honea claimed that CSED improperly garnished his wages and intercepted his tax return for payment of child support arrearages owed to the State of Alaska. We were assisted by North Carolina Assistant Attorney General Jerry Robbins. Working closely with AAG Steinberg, Mr. Robbins obtained a dismissal of the case based on sovereign immunity and lack of personal jurisdiction.

Commercial & Fair Business

Regulatory Commission of Alaska Adopts Regulations

In January, AAG Virginia Rusch worked on three regulation projects initiated by the Regulatory Commission of Alaska. The RCA's ex parte regulation was put in final edited form in collaboration with AAG Steve Weaver. This regulation defines prohibited ex parte contacts in adjudicatory proceedings, and lists some forms of contacts that are not prohibited.

AAG Rusch also work with RCA staff to edit regulations addressing directory assistance requirements for local exchange and long distance carriers in Alaska, and addressing certification requirements and exemptions for water and wastewater utilities.

Enstar/NorthStar Gas Contract - RCA Docket No. U-03-084

This case came before the Regulatory Commission of Alaska in August involving a request by Enstar for RCA approval of a gas supply contract with NorthStar Energy Group ("NorthStar") to supply natural gas service to Homer. Under its tariff on file with the RCA, and AS 42.05.361(a), Enstar is required to

obtain RCA approval of this contract before it can be implemented.

Under the proposed NorthStar contract, like all of Enstar's gas supply contracts, all gas costs are passed directly through to ratepayers through Enstar's fuel adjustment clause. Thus, Enstar is largely, if not completely, economically indifferent to the cost of gas negotiated under the agreement.

The Attorney General contested five questionable provisions in the agreement: (1) the mechanism for pricing gas under the contract; (2) the proposed 20 year term of the contract; (3) arbitrage opportunities existing under the contract; (4) cross subsidization of rates called for in the proposal; (5) and the transportation fee provision of the contract, various parts of the proposed gas contract, including the pricing provision.

Trial was held in January on this case. The RCA has taken the matter under advisement. AAG Steve DeVries represented the Attorney General in this docket.

Arctic Slope Telephone Association Cooperative, Docket U-03-33

This is a rate case proceeding before the Regulatory Commission of Alaska. ASTAC is a rural telephone cooperative, exempt from competition under the Telecommunications Act of 1996. 47 U.S.C. § 251(f). Only the Barrow exchange is rate regulated. The Barrow exchange was part of a statewide stable of local telephone companies owned by GTE which were divested in 2000. The RCA ordered rate cases for all of the divested telephone companies. After acquisition, ASTAC attempted to deregulate the Barrow exchange under AS 42.05.711(h) from RCA rate regulation. The vote failed in 2002.

The current proceeding involves a rate design for the utility. On January 9, 2003, the Attorney General entered into a stipulation with the utility resolving all outstanding issues. In this

stipulation, the utility agreed to withdraw its request to bill customers \$44/hour for toll investigations initiated by customers. All other provisions of the utility's proposed rate design were acceptable. A decision by the RCA on the proposed stipulation is pending.

AAG Steve DeVries represented the Attorney General in this proceeding.

State Medical Board Revokes Two Licenses, Suspends One, At January Meeting

In three separate matters, the State Medical Board adopted the proposed decision of the hearing officer and revoked the licenses of two Anchorage physicians and suspended for one year the license of a physician assistant. The Board revoked the license of Jeffrey Gottlieb based on his 2002 conviction for perjury, forgery, theft from Alaska's Medicaid Fund, and misconduct involving a controlled substance. He is presently incarcerated at a facility in Arizona. The Board revoked the license of Steven Kaniadakis based on his 1999 conviction for health care fraud and mail fraud related to the conduct of his medical practice. Kaniadakis is presently incarcerated at a facility in Pensacola, Florida.

The Board suspended for one year the license of physician assistant John Winczura based on his use of alcohol while practicing at a health center on St. Paul Island in April-May 2000. In one instance, while impaired by alcohol, he failed to provide appropriate care to a 5-year-old girl with a fractured arm. In a second instance, while responding to a medical emergency at a residence, a strong odor of alcohol was detected on his breath and he was observed to stagger. Even after his suspension is completed, Winczura will not be relicensed until the Board has the opportunity to review his case and, if necessary, impose restrictions on his practice.

AAG Roger Rom represented the Division of Occupational Licensing in the Gottlieb and

Kaniadakis proceedings. AAG Robert Auth represented the Division in the Winczura proceeding.

Court Dismisses Appeal in Case Against Alaska Commission on Postsecondary Education

In the Alaska Supreme Court case of *Virginia Hardham v. ACPE, University of Oregon, et al.*, Hardham appealed numerous rulings by Superior Court Judge Michalski. The superior court had ruled that Hardham's claims against the numerous defendants were barred by the applicable statute of limitations and *res judicata*. No briefing schedule was ordered because Hardham had requested a waiver of the filing fee and cost bond claiming poverty as the reason for her request. She initially requested that she be able to appeal at public expense and to not be required to file a cost bond. She also requested assistance with the preparation of the transcript of the only hearing held in the lower court as well as with her brief and for the court to appoint an attorney to represent her.

The court ordered that she would not have to transcribe the hearing and she would not have to file bound briefs with the court, but she would have to pay a significantly reduced filing fee and costs bond by January 5, 2004. She filed numerous motions for reconsideration asking for additional time to pay the filing fee and cost bond (until April 15, 2004) and for the court to either appoint an attorney to help her prepare her appeal or to order sanctions against AAG Mary Ellen Beardsley for allegedly conspiring with the other defendants to get the lower court case dismissed. All of her other requests were denied and she failed to pay the filing fee and cost bond by the due date. The appeal has now been dismissed by the Alaska Supreme Court

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Environmental

Settlement Reached in *Alaska Forum for Environmental Responsibility (AFER) v. ADEC.*

In July 2002, AFER and three other environmental groups filed a declaratory judgment action against the Department of Environmental Conservation concerning ADEC's oil spill scenario assumption guidance document for North Slope contingency plans. Plaintiffs argued that ADEC's use of a guidance document rendered it an APA regulation and improper delegation of authority. Plaintiffs also contended that all renewals of c-plans were required to undergo a second Alaska Coastal Management Plan (ACMP) consistency review irrespective of whether the underlying project had undergone any modification.

ADEC responded that the guidance was not binding on ADEC and that it considered the application of the guidance assumptions on a case-by-case basis as part of its public review and approval of individual c-plans. With respect to the ACMP issues, ADEC pointed out that the ACMP regulations had been amended in January to codify the prior practice of not requiring a second ACMP review on renewal of a resource agency authorization.

In recognition of ADEC documenting, in a settlement agreement, its position concerning the use of the North Slope Guidance and providing Plaintiffs with certain public record c-plan documents, Plaintiffs agreed to dismiss their suit with prejudice on December 31, 2004. Each party is to bear its own costs and attorneys fees. AAG Breck Tostevin represented the State.

Ninth Circuit Reverses Sterling Zipmart Case

Last month the Ninth Circuit Court of Appeals reversed the district court in *Zurich v. Whittier Properties*. Alaska and eight other states filed an amicus brief seeking reversal, as did the United States. The case arose from a 50,000-gallon gasoline spill at the Sterling Zipmart, a gas station in Sterling, Alaska. Because the station owner, Whittier Properties, has no assets, ADEC has been forced to take over cleanup of the spill, which is estimated to ultimately cost \$2,000,000 to \$10,000,000.

As required by state and federal law, Whittier had a \$1,000,000 pollution insurance policy with Zurich American Insurance Co. In a declaratory judgment action against Whittier, Zurich persuaded the lower court to rescind the insurance policy because of Whittier's failure to disclose prior known contamination. On appeal Alaska and the U.S. argued that EPA regulations, adopted by reference by DEC, did not allow the policy to be rescinded and that the purpose of mandatory insurance is to provide funds for cleanup and to protect the public. The Ninth Circuit agreed and reversed the lower court's decision.

The decision is significant for Alaska because it will assure that funds are available as intended under Alaska statutes that require entities that handle hazardous materials and petroleum to establish financial responsibility. Pollution insurance is a common means to establish financial responsibility. AAG Alex Swiderski represented the State.

Supreme Court Decides Red Dog Appeal

On January 21, 2004, the U.S. Supreme Court ruled against the Alaska Department of Environmental Conservation in its case against EPA over an air quality permit at the Red Dog Mine. In a 5-4 decision, the Court held that EPA had the authority under the federal Clean Air Act to ensure that when a state issues certain air permits for new facilities, its selection

of Best Available Control Technology (BACT) to limit emissions from that facility is based on a reasonable analysis. The majority agreed with EPA that ADEC's selection of low-NOx emission control as BACT at Red Dog was not reasonable, because the company had not shown that it could not afford the more effective and expensive technology, known as selective catalytic reduction.

The four-justice dissent was sympathetic to ADEC's argument that it was the province of the courts, not EPA, to evaluate whether the agency had acted reasonably in its permitting decision. Moreover, recognizing EPA's authority to disapprove ADEC's permits introduces uncertainty into the permitting scheme, as there are no rules or schedules for EPA, the state and the permit applicant to be guided by in EPA's exercise of such oversight.

Labor & State Affairs

Plaintiffs Drop Lawsuit on PFD Initiative

The plaintiffs who sued to challenge the Lieutenant Governor's decision denying certification of an initiative that sought to protect the permanent fund dividend distribution formula and to protect the earnings of the fund have agreed to dismiss the lawsuit. The plaintiffs indicated that their decision was driven by the Governor convening the Conference of Alaskans on the role of the Permanent Fund. The plaintiffs believe that the Governor and the Legislature should be given a free hand to proceed with their program, and that whatever is done will render the original initiative obsolete. Therefore, the parties have stipulated to dismissal of the plaintiffs' lawsuit, with each party to bear their own costs and fees. AAG Sarah Felix handled this matter.

Alaska Supreme Court Affirms Decision of the Alaska State Commission for Human Rights

On December 31, 2003, the Alaska Supreme Court issued a decision in *Loretta Jenkins-Welch v. Alaska State Commission for Human Rights*, Supreme Court Case No. S-10624. The court affirmed the Commission's decision to close Jenkins-Welch's administrative case. Jenkins-Welch had filed a complaint with the Commission alleging that her employer, the Anchorage School District (ASD), discriminated against her on the basis of her race (African-American). While the Commission was investigating her allegations, Jenkins-Welch filed a substantially similar action in superior court alleging violations of the Alaska Human Rights Act, AS 18.80 *et seq.* against ASD. The superior court eventually dismissed Jenkins-Welch's case on the basis that she had waived her claims by entering into a prior settlement agreement with ASD. When the Commission discovered that Jenkins-Welch's superior court case was dismissed, it issued a Final Order closing her administrative case. The Alaska Supreme Court held that the Commission acted properly in closing Jenkins-Welch's administrative case. AAG Robert Royce handled this matter for the Commission.

Alaska Supreme Court Rules Against State in Little Davis Bacon Case

The Alaska Department of Labor and Workforce Development brought a Little Davis Bacon case against Board of Trade, Inc. for failing to pay prevailing wages to workers who worked at the Cape Nome Quarry in support of a public construction project. The quarry was located 13 miles from the public construction site at the Nome Airport. This is the second time that this case has reached the Alaska Supreme Court.

Originally Board of Trade challenged the Department's construction of the Little Davis Bacon Act. In *Board of Trade, Inc. v. State*,

Department of Labor, 968 P.2d 86 (Alaska 1998), Board of Trade argued that the court should construe the Little Davis Bacon Act similar to how the federal courts have construed the federal Davis Bacon Act. The federal courts have held that an employer must pay federal Davis Bacon wages to employees working at a quarry only if the quarry was at the project site or adjacent to the project site. The Alaska Supreme Court held that Alaska's statute was broader than the federal Davis Bacon Act. However, the court ruled that there had to be some geographical limitation. The court held that if the Cape Nome Quarry was the closest source of material that met the specifications for the project, the employer would have to pay Little Davis Bacon wages. The court remanded the case to the Department for hearing.

On remand, the Department ruled that the Cape Nome Quarry was the closest known source for suitable material that met the specifications for the project and the superior court affirmed the Department's decision. However, on January 23, 2004, the Alaska Supreme Court reversed and found that two other closer pits were capable of producing material that met the specifications for the project. AAG Toby Steinberger handled this matter.

Legislation & Regulations

Legislature Convenes; Legal Review of Regulation Projects Completed

On January 12, 2004, the Alaska State Legislature convened. The Legislation and Regulations Section has had a busy month editing and finalizing legislation for the governor's deliberations.

During January 2004, the section also completed final legal reviews for the following regulations projects: (1) Commercial Fisheries Entry Commission -- point system for Kodiak

bairdi Tanner crab and landing permits for halibut and sablefish in the exclusive economic zone; (2) Board of Education and Early Development -- teacher certification fees; special education placement during due process hearings; and tuition costs to districts for educating out-of-district children; (3) Board of Fisheries -- Southeast Alaska Area commercial king and Tanner crab and Chignik Area Cooperative Commercial Purse Seine Salmon Fishery; (4) Department of Fish and Game -- aquatic farms acquisition of wild stock; (5) Division of Occupational Licensing -- pharmacy regulations and dental hygienist regulations; and (6) Department of Transportation and Public Facilities -- manual updates.

Natural Resources

Native Allotment Application of Donna Miller (Huff)

Seven years after the contested hearing and briefing were completed in this matter, the Department of Interior this month issued a decision denying the Native allotment application filed by Donna Miller (Huff).

The lands subject to the application are located within Kachemak Bay State Park. Because of the state's interest in the lands, it was able to challenge the application. At the 1996 hearing, the applicant Donna Huff testified on her own behalf, while the state presented six witnesses to contest her claim of qualifying use and occupancy. Each of the state's witnesses had either fished off the shore of the claimed parcel or otherwise occupied adjacent homestead property at the critical time. Fortunately, the passage of seven years since the hearing did not diminish the impact of the witnesses' testimony. The agency decision denies the application based on its determination that the applicant's sporadic use of the land as a child did not qualify her for an allotment under the Native Allotment Act. The agency found that

her use and occupancy of the land was not as an independent person, and not substantially continuous or potentially exclusive of others, as required under the Act.

Earle W. Johnson v. Commercial Fisheries Entry Commission

On January 21, AAG John Baker filed the State's brief in the Alaska Supreme Court in *Earle W. Johnson v. Commercial Fisheries Entry Commission*, No. S-11142, an administrative appeal from the denial of Johnson's limited entry permit application. The State pointed out that, although Johnson devoted the bulk of his opening brief to challenging the CFEC's decision setting the optimum number of permits for the Northern Southeast Inside sablefish (black cod) fishery, he had waived the issue by failing to raise it below. Johnson also argued that the CFEC's rulings on his point claims were arbitrary, and that Juneau Superior Court Judge Patricia Collins abused her discretion in denying his motion to supplement the record on appeal in order to challenge the NSEI sablefish optimum number. Briefing is due to be completed in mid-February.

Easement Termination Challenge

On January 30, AAG John Baker filed the State's brief in *Appeal of the State of Alaska*, IBLA No. 2004-6, a challenge to a Bureau of Land Management decision to terminate easements reserved under Section 17(b) of ANCSA. The easements, within the Port Graham village selection area south of Seldovia, provide access primarily to three navigable lakes, Rocky, Scurvy, and Upper English Bay, the beds of which are owned by the State. The State contends that, because the lakes and their submerged lands constitute "isolated tracts of publicly owned land" under the ANCSA regulations, BLM was obligated to retain them, even without a determination of the level of public use of the easements. Of particular concern to the State is that BLM's decision referred to each lake as non-

navigable, even though each is approximately 100 acres in size and the BLM excluded them from its patent of the surrounding uplands to the Port Graham Corporation. A decision is not expected for several months.

Alaska Supreme Court Lays to Rest 13-Year-Old Subsistence Dispute

On January 16, the Alaska Supreme Court resolved a lawsuit, filed in 1991, that challenged subsistence actions taken by the state. The plaintiffs, several Alaska Indian Tribes, raised two main issues. First, they alleged that a section of the current subsistence law violates the "equal access" clauses of the Alaska Constitution. The challenged section provides that in nonrural areas of the state (called "nonsubsistence areas") subsistence does not have a priority over other uses of fish and game. Second, the plaintiffs alleged that the Joint Boards of Fish and Game improperly drew the boundaries of the Southcentral Alaska nonsubsistence area - boundaries that put the Tribe's villages and a large portion of the Kenai Peninsula inside the no-subsistence zone.

The superior courts ruled in favor of the Tribes in separate decisions, and the state appealed each ruling. In 1995, the Alaska Supreme Court reversed on the first issue. It held that the nonsubsistence area provision does not violate the Alaska Constitution.

In the January 2004 decision, the Alaska Supreme Court reversed the superior court on the second issue. The justices found that the Boards, back in 1992, did not err in their approach, which was to begin with boundaries of large "nonrural" areas that had been drawn under an earlier subsistence law. In reviewing those boundaries, the Boards had properly considered the testimony and written comments presented to them and were not required to seek more information. The court ruled that Board members could rely on their own expertise. Finally, it found that the Boards had taken a "hard look" at available

information, had analyzed it under the statutory criteria for drawing boundaries and, in particular, had taken a "hard look" at the plaintiffs' villages. The territory that the Kenaitze tribe wished to have excluded from the nonsubsistence area - essentially the entire Kenai Peninsula - lacked a discrete, geographic area that was inhabited by tribal members, one to which the statutory criteria could be applied.

Numerous department attorneys advised the Boards when they made the nonsubsistence area boundaries or defended the state in this lawsuit. They include Jack Griffin, Bonnie Harris, Lance Nelson, Kevin Saxby, Steve White, and Henry Wilson.

Opinions, Appeals & Ethics

Presentation on Appellate Cases Made for CINA Conference

AAG Mike Hotchkin participated in a two-day statewide Child-In-Need-of-Aid conference in Anchorage. In addition to AAGs and paralegals from the Human Services Section throughout the state, social worker supervisors and other staff from the Department of Health and Social Services attended. Mike gave a presentation summarizing human services appellate case law from 2003, and provided attendees with research tools to help them keep their knowledge of relevant case law current. Mike also participated as a panelist regarding human services issues currently in litigation.

Attorney General Advises Public on Executive Ethics Act

The section assisted the Attorney General in preparing a "Compass" piece to promote better public understanding of the Executive Ethics Act. The article, published in the Anchorage Daily News on January 20, 2004, addresses both the purposes of the act and

how it is administered. The ethics act operates as a strong deterrent to unlawful activity. It is also preventative in that it allows public employees to receive prompt advice, allowing them to avoid violations of the law. The article explains the role of our office in providing advice, investigations, and follow-up on Ethics Act matters to facilitate agency decision making, prevent potential problems, and to ensure sound enforcement of the law. Copies of the article are available from CAAG Barbara Ritchie.

Potential Appeals Evaluated

The section evaluated three superior court decisions for possible appeal or petition for review. *Cowles v. State* involves a claim of negligent parole supervision and negligent failure to revoke parole. The state has filed a petition for review in that case. The other cases involved the issue of whether the state had waived a *res judicata* argument in an employment law case, and whether the superior court had erred in denying a petition to waiver juvenile jurisdiction in a juvenile delinquency case. We concurred with the recommendations of the trial attorneys in both of these cases to not appeal the decisions. We also worked with outside counsel to prepare the state's points on appeal in *Planned Parenthood v. State*, the case in which the superior court found the Alaska Parental Consent Act unconstitutional.

Torts & Workers' Compensation

Torts and Workers Compensation Section Busy with Supreme Court filings

AAG Venable Vermont filed the state's brief as appellee in *Guerrero v. AHFC*, State of Alaska, in this case's second trip to the Alaska Supreme Court. It involves allegations of negligence in failing to take appropriate safety measures in the construction of the A/C couplet in the early 80's, and a host of related claims

Agencies Settle Contract Claims

against DOT. It also involves claims against AHFC for failing to take appropriate safety measures to protect its tenants against the dangers of C Street. Both defendants State and AHFC won summary judgment below. Plaintiff is appealing the award of summary judgment by the trial court. The claims arise out of injuries suffered by an unescorted 5-year-old who dashed into traffic on "C" Street in Anchorage and was struck by a car.

The State filed a petition for review in the Alaska Supreme Court, seeking to have the court overturn its ruling in the *Neakok* case that the state owes an actionable duty of care to supervise adult parolees. In *Cowles v. State*, the plaintiffs alleged injury arising out of a murder/suicide by a mandatory parolee. The state moved for summary judgment based on *Sandsness*, a recent Alaska Supreme Court case that found there was no duty to petition for continued retention of juveniles past their 18th birthdays because such decisions involved the balancing of protection of the public against rehabilitation of the offender. A strong concurrence indicated a willingness to reexamine *Neakok*, in the adult context. The state's motion for summary judgment was based on the *Sandsness* opinion (as well as other Supreme Court cases decided subsequent to the *Neakok* decision). The state's motion was denied by Judge Tan, who ruled that he had to follow *Neakok* until it was overruled by the Supreme Court. The trial has been stayed pending a decision on the Petition. The State's defense is being handled by AAG Venable Vermont, Jr.

In a tandem case to *Cowles* case discussed above, the Alaska Supreme Court accepted the Petition for Review lodged by the State in another parole supervision case, *Jane Doe v. State*. The *Doe* case raises the same issues as those in *Cowles* with the same request that the *Neakok* decision be reexamined. A briefing schedule on the Petition was ordered by the Supreme Court. The *Doe* case is being handled by AAG Stephanie Galbraith.

The Department of Corrections settled a breach of contract claim brought by a roofing contractor working on the Lemon Creek Correctional Facility. The State had terminated the roofing contract when the contractor failed to provide the roofing membrane required by the contract. The contractor claimed an alternative type of membrane would serve the department's purpose, and also claimed it could have installed the required membrane if given a small amount of additional time. The contractor claimed approximately \$100,000 in damages. In settlement, the Department of Corrections agreed to pay the contractor approximately \$20,000. AAG Peter Putzier represented the State.

The Department of Natural Resources settled a claim brought by a construction contractor working on a boat launch facility in the Fairbanks area. The contractor claimed additional compensation due to extra expenses caused by unexpected permafrost. Under the terms of a compromise, the Department of Natural Resources agreed to pay approximately \$80,000 of the \$170,000 claimed by the contractor. AAG Gary Gantz represented the State.

Judicial Decision Halts Iliamna-Nondalton Road Construction

The State proposes to complete a road from Iliamna to Nondalton. Robert Gillam, an individual who owns real property near the proposed project, and the Alaska State Council of Trout Unlimited, sued to stop the construction. They argued the State had not followed its transportation planning statutes. Superior Court Judge Sharon Gleason issued a preliminary injunction halting the project until the State evaluates the economic costs of the project in its next revision of its Southwest

Regional Transportation Plan. The Department of Transportation and Public Facilities is beginning this revision. AAG Susan Urig is representing the State in this matter.

Superior Court Remands Relocation Appeal

People who are displaced by condemnations may receive "relocation benefits" to help cover costs related to the displacement. The owner of a greenhouse believed he should receive relocation benefits for certain trees and shrubs. DOTPF's relocation staff believed relocation benefits were not available because the trees and shrubs in question were landscaping, attached to the realty, not nursery stock realistically available for sale. DOTPF's relocation board of appeals held a hearing and ruled that relocation benefits could not cover the trees and shrubs in question. Following an appeal, the superior court remanded to the relocation board of appeals for additional findings concerning the nature and use of the trees and shrubs. AAG Susan Urig represented DOTPF's relocation staff.

Board of Trade Case Concludes

The resolution of a dispute between Board of Trade, Inc., and the Alaska Department of Labor will allow DOTPF to close a long-open file. In 1991, DOTPF awarded a contract to Board of Trade to resurface a runway in Nome. Board of Trade obtained rock and gravel from the Cape Nome Quarry, thirteen miles from the airport. DOTPF initially represented to Board of Trade that the Cape Nome Quarry was "off-site" and thus Little Davis-Bacon Act wages did not apply to quarry employees. In 1992, the Alaska Department of Labor determined the Cape Nome Quarry was "on the site" of the public construction project and that employees at the quarry were thus entitled to compensation at Little Davis-Bacon Act wages. After two trips to the Alaska Supreme Court, the Court ruled that the quarry

was "off-site." AAG Paul Lyle assisted DOTPF.

Criminal Division

ANCHORAGE

The Anchorage office presented 29 cases to the grand jury in January, and there were six trials during the month.

It was unusual, but there were no new homicides committed in Anchorage during January. The grand jury indicted a man for a November murder in the drive-by-shooting death of a military police woman. In addition, two women were indicted as accomplices to the murder. One of the women had been dating a man who started dating the victim, and the woman telephoned both the old boyfriend and the victim on the day of the murder, to challenge them to a fight. She also called her girlfriend's boyfriend to come over with a gun. The girlfriend supplied the car and rolled down the window and got out of the line of fire so that the boyfriend had a clear shot at the victim's car.

In a case that shows that many criminals do not watch the hit TV crime lab show "CSI", ADA Pat Hanley convicted Craig Brown of the burglary and theft from the People Mover offices in Anchorage. Brown was identified solely by his fingerprint on the cash register from which he took money. Brown had also been convicted of a second burglary in December based solely on his DNA being found in the blood found shards of glass from the front door to the business that Brown had broken in to gain entry.

ADA Mike Burke convicted Marc Harrison of theft in the second degree and attempted theft in the second degree. A Wal-Mart security officer saw Harrison and an accomplice fill a cart with merchandise and start to leave without paying. The Wal-Mart greeter stopped them

and directed them to the checkout counters. But Harrison and the accomplice simply left the merchandise and walked out. In an example of how to predict criminal behavior, the security officer drove to the next closest Wal-Mart store and waited. Harrison and the accomplice showed up at the second Wal-Mart, selected many of the same items they had at the first store, and rolled the cart out the door. This time they made it all the way out the door and the security officer stopped them.

As to the rest of the six trials, three were acquittals by the trial jury and one a directed verdict of not guilty.

BETHEL

After a jury trial, Jonathan Ayagarak was found guilty of assault in the fourth degree. Also on trial during the month of January was John Wilde, who was found not guilty of driving under the influence and refusal.

The grand jury indicted five persons for sexual assault of a minor in the first degree, two persons for sexual assault of a minor in the second degree, and one person for sexual assault in the second degree. Also issued were indictments for felony driving under the influence and refusal, forgery in the first degree, burglary in the first degree, assault in the second degree and two indictments for assault in the third.

Judge Devaney denied Gabriel Serradell's application for post conviction relief. Serradell is serving a 30-year sentence for murder in the second degree and had argued that his attorney was ineffective because she "tricked" him into entering a plea.

In other news, DA Gregg Olson taught "Criminal Law, Search Warrants and the "Laws of Arrest" for three days at the Alaska State Troopers re-certification course in Sitka.

FAIRBANKS

The Alaska Bureau of Alcohol and Drug Enforcement arrested eight defendants for sales of crack cocaine. Four North Pole residents were arrested in two separate methamphetamine lab busts and a Salcha man was arrested in connection with a methamphetamine lab found in his home.

A 35-year-old defendant sexually molested a 9-year-old female relative at her North Pole home, and a Fort Yukon man was charged with sexually assaulting his cousin.

In January, 45 cases were presented to the Fairbanks Grand Jury. Several individuals were indicted on drug related charges. A man was indicted for first-degree murder in connection with the October killing of a 19-year-old, apparently for the victim's Permanent Fund Dividend. A woman was also indicted for manslaughter, driving under the influence and leaving the scene of an injury accident after hitting a pedestrian near Nenana.

The already short-staffed Fairbanks office took assumed an even greater caseload at the beginning of January, when the Barrow Assistant District Attorney position became vacant.

JUNEAU

John Tanner was sentenced to 20 years with five suspended for first degree sexual assault. It was his first felony conviction but ADA Doug Gardner proved five aggravators, including deliberate cruelty and most serious, to convince the sentencing judge that *Austin* limits were not being violated. Tanner attacked his spouse and, over the course of hours, beat, choked and sexually assaulted her, resulting in pulling and tearing her insides out and causing serious injury.

DA Pat Gullufsen's faith in jury common sense was confirmed by a guilty verdict in an unusual District Court jury trial, where the judge had

suppressed breathalyzer and blood results, as well as police officer observations regarding intoxication, and in which there was no observation of driving. The defendant was, however, seen running from a car in the middle of the night in which was found (next to the driver's seat) six empty beer cans and a near-empty bottle of tequila.

KENAI

The stream of felony and misdemeanor trials continued on the Peninsula in January. Not a week went by without at least one trial, and some weeks there were trials in more than one city. Again, we thank all the visiting Assistant District Attorneys who have pitched in to help, despite their own busy schedules. Our newest Assistant District Attorney, Alex Boal, is now on board, and the February Bar Exam looms large in his future.

Among the new cases indicted by the grand jury this month were numerous drug charges, including a series of drug sales in Seward to undercover police officers from the Alaska Bureau of Alcohol and Drug Enforcement.

KETCHIKAN

Herman Seludo was convicted by a Ketchikan jury of assault in the fourth degree for hitting another man in the face. A Ketchikan jury was hung (five to one for conviction) on a driving while intoxicated charge against a woman with a 0.071 breath test and had no bad driving. Her case is set for retrial. Another Ketchikan jury was hung on an assault in the fourth degree charge, even though a videotape showed the defendant punch the victim 12 times in the face, leaving him with a bloody ear, cut lip, and swollen face. A man was found not guilty by a Craig jury of stalking and assault in the third degree (placed in fear with axe) in Thorne Bay.

Three Ketchikan men (one a juvenile) went to a construction site just outside Ketchikan and started an excavator, which they used to

wreck two construction trucks and damage a third. They extensively damaged the excavator in the process. They also started a front-end loader, drove it a short distance, only to get it stuck in the mud. They then stole a truck, drove it a couple of miles to a parking lot by a boat ramp, where they set the truck on fire, destroying it. After which they broke out the windows of three vehicles in the parking lot and went across the street to steal another car, which they drove a few miles. While stopped in a driveway, they got stuck and the owners of the residence contacted the troopers. One man has been indicted with four charges of vehicle theft in the first degree and six charges of criminal mischief in the third degree. The other adult has been indicted for two charges of vehicle theft in the first degree and three charges of criminal mischief in the third degree. The juvenile has been charged in juvenile court. Total damage is expected to exceed \$100,000.

A teenager was indicted for possession of child pornography. When he was 17 years old, he directed a 13-year-old girl and two 15-year-old boys to engage in sexual activity, which he videotaped. Unfortunately for him, he kept the tape until he turned 18.

Other grand jury action included indictments for theft, sexual abuse of minor in the third degree, and misconduct involving controlled substance in the fourth degree.

KODIAK

A Kodiak Island man was sentenced to 15 years in prison, with six suspended, following his conviction for sexual assault of a minor in the first degree. Following his release from incarceration, he will be on probation for 10 years. In addition, he will be required to register as a sexual offender for life.

Following up on a tip from Anchorage Narcotics Detectives, an Anchorage man was intercepted on an incoming flight at the Kodiak airport. After the man refused to allow local narcotics

detectives to search his hand-carried bag, they applied for and received a search warrant. They found the man carrying 1.3 pounds of cocaine with a street value in excess of \$60,000. The Kodiak grand jury subsequently indicted him for misconduct involving a controlled substance in the third degree. A March trial date is pending.

A Kodiak woman, employed by a local island air-service, constructed a false airline employee identification card for her son, whom she knew to have felony charges pending in another state. Her son subsequently fled the other state traveling under the fictitious name his mother had placed on the false identification card. A bail bondsman tipped off local authorities that they believed he would be returning to Kodiak. He was seen by an off-duty Kodiak detective, who personally knew the man, but he again tendered the false identification card and claimed to be the fictitious person. The man was quite adamant in continuing this charade until confronted with the tattoo jail personnel had observed on his back as he was being booked into custody. The tattoo? His real name. While her son was awaiting extradition to the other state, the Kodiak grand jury indicted the mother for hindering prosecution in the first degree, a class B felony.

KOTZEBUE

Alaska State Troopers received a report that drugs were being shipped from Anchorage to Kotzebue on a freight airline. The person who picked up the package gave consent to search, and nearly a pound of marijuana was discovered. The sender of the package, a woman from Pt. Hope was interviewed and arrested. Both suspects were charged with misconduct involving a controlled substance in the fourth and fifth degrees.

The Alaska Bureau of Investigation is investigating a stabbing death in Kotzebue that occurred this month. In another stabbing case, Alaska State Troopers investigated a

case in the village of Ambler, where a young woman stabbed a friend in the leg after an argument, and then left town. She was arrested and charged with assault in the second and fourth degrees.

ADA Windy East helped out in the Kenai office for a week and successfully prosecuted a DUI trial in Homer.

NOME

A Stebbins resident was indicted for sexual assault stemming from an incident last spring in which his girlfriend's 17-year-old daughter was sexually assaulted after passing out. The man at first adamantly denied any sexual contact with the girl, but quickly changed his story to consent after a DNA test. A Unalakleet man was indicted on a number of felony counts after he shot his way into an acquaintance's residence and then fired several shots in the direction of local police officers who were responding to the incident. A woman was also indicted after a New Year's Eve celebration in Nome got out of hand and her boyfriend ended up stabbed in the arm. A Nome resident was arrested for sexual assault in the second degree with an incapacitated victim who has no recollection of the offense, but there were independent witnesses. Finally, perennial defendant Joseph Wilson was indicted for escape, for breaking out of the Unalakleet jail. The good thing is that he didn't make it far; he was found hiding in a locked storage room in the adjoining Unalakleet police station. The bad thing is that the closet served as UPD's weapons locker, but fortunately none were loaded.

PALMER

David Sorrentino, a summer employee at the Talkeetna Lodge, pled to sexual assault in the second degree, committed by entering the victim's room while she slept. Sentencing is set for April.

Charles Slack, a 31-year-old, pled to one count of sexual abuse of a minor in the second degree for his sexual relationship with his 15-year-old first cousin. The victim, who became pregnant as a result of their relationship, intended to marry him, but her best friend reported it to the police. During the investigation, the victim's parents (who are Slack's aunt and uncle, remember) told the Alaska State Troopers that they had consulted the bible and determined the relationship was okay. The parents were charged with endangering the welfare of a minor, and the mother/aunt, Martha Mizell, was additionally charged with hindering prosecution when she attempted to help Slack leave the state by hiring someone to drive him over the Canadian border. Martha Mizell entered a plea to hindering prosecution in exchange for the dismissal of the charges against her husband. Sentencing for Mizell and Slack is set for March.

A man was indicted on multiple counts of sexual abuse of a minor in the first and second degree after abusing his 14-year-old niece. The defendant is also the victim's legal guardian. The abuse was discovered when the defendant walked into the Alaska State Troopers and confessed.

Another man was indicted on four counts of sexual assault in the first degree. The charges were based on two separate allegations that he sexually assaulted women in the Palmer-Wasilla area during the summer of 2003. DNA evidence and a surveillance video at a local bar helped seal the case. The investigation involved officers from the Alaska State Troopers, Alaska Bureau of Investigation, Mat-Su Unit, the Anchorage Police Department, State Crime Lab personnel and Palmer Police Department.

Dale Harvey was sentenced to seven years for the abuse on his daughter. The court found that the case was aggravated by the fact that he abused the victim for most of her life. The abuse was also aggravated by her mother,

who did not believe her, and allowed Harvey to remain in the house. The victim's mother previously pled to attempted hindering of prosecution.

Richard Tarver was sentenced to 36 months with 21 months suspended for his sexual relationship with a 16-year-old employee at Wendy's in Wasilla. Tarver was the victim's supervisor. The judge found the "vulnerable victim" aggravator, and found that Tarver's prospects for rehabilitation are guarded.

Other grand jury indictments include felony eluding; felony drugs and tampering with evidence. In the tampering case, the incarcerated defendant convinced a friend to call the jail posing as his probation officer and to tell the correction's officer that the defendant was to be released. It worked, but he was remanded again later that week and the Alaska State Troopers are continuing to investigate.

SITKA

The ADA Natasha Norris obtained a number of indictments for sexual assaults in Sitka and the fourth felony drunk driving indictment from Petersburg in the last four months, a significant increase in felony drunk driving in that small community.

OSPA

(Office of Special Prosecutions & Appeals)

Special Prosecution Unit

AAG Andrea Russel won the first jury trial held in Noorvik since the 1980's, with the judge finding the bootlegging defendant to be a worst offender and forfeiting his snow-machine. In other cases, the state obtained forfeiture of two more snow-machines and a boat. Five bootlegging indictments were handed down in Bethel and two in Anchorage.

Seward medical doctor Robert Fox pled guilty to misconduct involving controlled substances in the fourth degree for writing medically unnecessary prescriptions for Medicaid recipients. He further admitted that he then got the drugs returned to him for his own use. Dr. Fox was ordered to reimburse state Medicaid program that had paid for the drugs.

A former Juneau Department of Corrections employee was charged with embezzling over \$7,000 from the state by fraudulently altering her pay and leave balances in the state computer system. She pled to theft in the second degree. She will receive a suspended imposition of sentence and must make restitution.

The steady stream of cases involving violations of the Fairbanks and Anchorage automobile air emission Inspection and Maintenance "I/M" program continue to be resolved by this office.

Petitions & Briefs of Interest

Petitions of Interest

Declarations against interest. In a petition for hearing to the Alaska Supreme Court, the state argues that the court of appeals erred in holding that the declarant's statement identifying the defendant as one of the men who borrowed his shotgun, moments before a robbery occurred, was not a declaration against interest under Evidence Rule 804(b)(3). See *Smith v. State*, 81 P.3d 304 (Alaska App. 2003). The state asserts that the court of appeals construed the hearsay exception too narrowly and failed to consider the portion of the statement identifying the defendant in context of the entire statement. The state argues that the declarant's statements about cleaning and disposing of the shotgun after the defendant brought it back – which the court of appeals agreed were declarations against interest – made no sense

apart from the declarant's knowledge of the identity of who borrowed the shotgun. *State v. Smith*, S-11327.

Probable cause for methamphetamine production. The state argues that Judge Smith erred in suppressing evidence of a methamphetamine lab for a purported lack of probable cause to support the search warrant. The affidavit in support of the warrant described how two men had arrived in a car at a convenience store at 2 in the morning, separately purchased 8 bottles of Heet and coffee filters (commonly used in methamphetamine production), and how their car was traced to a residence from which a sweet chemical smell was emanating. The state argues that the facts, when viewed in their totality, constituted probable cause even if a single fact, viewed in isolation, would not. *State v. Nelson*, A-8741.

Constitutionality of four-ounce line for marijuana possession. In a 15-page petition, with 135 pages of appendices, the state argues that the court of appeals acted as a super-legislature in declaring that less than four ounces of marijuana is protected by the Alaska Constitution, see *Noy v. State*, Op. No. 1897 (Alaska App., August 29, 2003), and by not giving the state an opportunity to prove its legitimate interests in regulating in-home possession of marijuana by adults. The state argues that there are substantial grounds for the supreme court to reassess the decision in *Ravin v. State*, 537 P.2d 494 (Alaska 1975), such as the potency of marijuana today and recent scientific research showing that it is a more dangerous drug than was thought when *Ravin* was decided. Not to be outdone, Noy filed a cross-petition (supported an appendix at least double the length of the state's), arguing that the court of appeals acted as a super-legislature in declaring that four ounces or more of marijuana was punishable under *Ravin*. *State v. Noy*, S-11297.

Briefs of Interest

Sentencing considerations. The state argues to the Alaska Supreme Court that because the *Chaney* sentencing criteria have been supplanted by AS 12.55.005 and article I, section 12 of the Alaska Constitution, a sentencing court must put more emphasis on the effects of a crime on the victim and her family. (Article I, section 12 of the Alaska Constitution was amended in 1994 to provide that criminal administration should reflect both community condemnation of the offender and the rights of victims.) The state asserts that this new emphasis is especially appropriate when considering whether the defendant's sexual assault was among the least serious, the issue on which the Supreme Court ordered briefing. *Michael v. State*, S-11019.

Statute and Rule Interpretations

Limitation on actions that can be brought under AS 12.72.020(c). The court of appeals held that although AS 12.72.010(c) authorizes a court to hear a post-conviction relief application challenging a final administrative decision of the Department of Corrections or the Board of Parole, this grant of jurisdiction does not extend to Department of Corrections' decisions concerning prison conditions or disciplinary actions. *Hertz v. State*, Op. No. 1911 (Alaska App., January 9, 2004).